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The Lawyer's Professional Independence: Memories, Aspirations, and Realities

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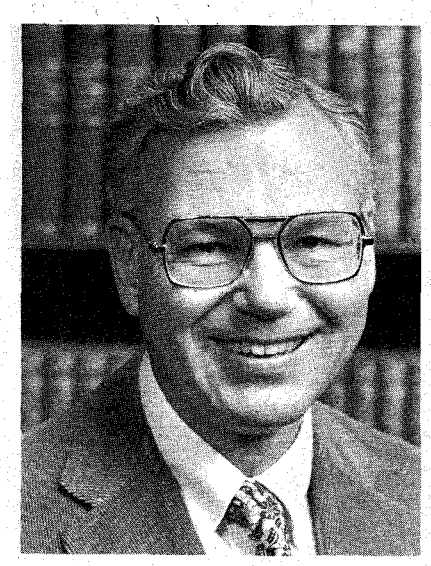

Does the public interest require an independent legal profession? My answer is: affirmative, providing we have a proper understanding of what we mean when we refer to such a vague and general concept. Professional independence means different things to different people. American lawyers, for example, frequently argue that the lawyer's ability to choose his clients (and thus control his work) is an important aspect of independence; while in England the "cab rank rule"—requiring a barrister to take any brief offered, with very limited exceptions—is viewed as a basic element of professional independence because it prevents the lawyer from being identified with the views or actions of particular clients.

The variability of this chameleon-like concept is strikingly illustrated by the remarks of the English barrister, Robert S. Alexander, in a recent monograph on professional independence:[1] All of the considerations he identified as supporting the professional independence of the English barrister are lacking in the United States: separation into two professions, with barristers handling litigation on behalf of solicitors; the requirement that a barrister practice on his own (barristers cannot join law firms or serve as house counsel); the requirement that a barrister take any case offered; the prohibition of contingent fees and of law suits to recover legal fees; the prohibition of advertising; and the small size and socially homogeneous character of the English bar (4,800 barristers organized in four Inns of Courts—factors that strengthen collegial ties and peer enforcement of norms). If the independence of the English barrister is supported by these considerations, all of which are absent in the United States, how can the American lawyer be independent? It

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[1] See Robert S. Alexander, The History of the Law as and Independent Profession and the Present English System.

is not surprising, in view of these different conditions, that lawyer independence in the United States takes a somewhat different form.

A crude but succinct statement of the heart of professional independence lurks in a pithy remark of Thurman Arnold. Arnold, a flamboyant figure of the last generation, occasionally addressed law students at some ceremonial function. He often concluded with words of advice to future lawyers:

> "There will come a time in your practice," Arnold would growl, "when, despite your very best efforts, someone has got to go to jail. When that time comes, make sure . . . it's the client!"

Here in a nutshell is the basic paradox of professional independence. The lawyer is loyal to his client, providing a vigorous and fearless presentation of the client's cause. But his zeal for the client is tempered by the lawyer's duties to the court, to adversaries and third persons, and to the public. He is not a mere alter ego, mouthpiece, or "hired gun" of the client, but an independent professional who observes professional standards of integrity, devotion to the truth and justice, and respect for broader social values.[2] Thus when the time comes when someone must go to jail, it is the guilty client and not the lawyer—there is no perjured testimony, no suppression of documents, or other violation of professionl and legal standards.

This traditional view of the dual aspect of professional independence—duty to client balanced by duty to court and public—is directly contrary to the famous statement of Lord Brougham that a lawyer is responsible to his client and his client alone.[3] The excessive rhetoric he used in defense of Queen Caroline was rejected, not only by his own later statements, but by leaders of the bar in both England and America.[4]

David Dudley Field stated the orthodox position in 1855:

> "[The lawyer's] first duty is undoubtedly to his own client, but that is not his only one; there is also duty to the Court, that it shall be assisted by the advocate; a duty to the adversary, not to push an advantage beyond the bounds of equity; a duty to truth and right, whose allegiance no human heart can renounce; and a duty to the state, that it shall not be corrupted by the example of unscrupulous insincerity."[5]

This mosaic of warm and evocative symbols—truth, justice, and fairness—presupposes that a true lawyer is a person committed to a self-directed calling, not just a job—a calling informed by a spirit of public service. The lawyer is a minister of justice as well as a champion; he is not out to win at all costs. Is this ideal merely a memory of what might have been in some golden age of the past? Is it a dream that we preserve because it evokes a warm glow even though it has little relation to present realities?

Social scientists have advanced two contradictory theories explaining the central role of professions in modern life. Although they have technical names, I will refer to them as the *public interest model* and the *market model.*

The public interest model attributes the special status, power, and reward of professionals to the expertise, skill, and judgment they bring to bear to the solution of important problems in individual or social life.[6] Professionals are an aristocracy of talent, selected and qualified by arduous educational and apprenticeship experiences. Their specialized knowledge creates demand for their services; and their skill, collegial identification, and autonomy are the source of power that need not be tainted by self-interest, but embraces altruistic motives and dedication to public service. Because of their broader view—a detachment from narrow self interest—they are in a position to mediate among contending interest groups and thus to bind society together. They are a balance wheel, helping to stabilize society.[7] Clearly this is a portrait that justifies and supports professional independence.

The market model provides a less noble explanation for the status, trappings, and symbols of the professions. Its exponents, like G.B. Shaw, view the professions as "conspiracies against the laity."[8] Professionals attempt to create demand for their services, control the market for them, and persuade the public that their high status and earnings are in the public interest. In this view, professional behavior is oriented toward their private interests as individuals or as a professional group.[9] Their control over access to the profession and its services, these critics argue, should be broken down by competitive market forces, perhaps assisted by outside regualation.

Which explanation is correct? Which portrait is closer to contemporary realities? These are basically empirical questions that ask, in the case of lawyers: How do lawyers behave? What factors shape their behavior? The analysis must deal

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[2] See Archilbald Cox, The Conditions of Independence for the Legal Profession , in op. cit. note 1 supra.

[3] 2 Trial of Queen Caroline 8 (1821), quoted in David Mellinkoff, The Conscience of a Lawyer 189 (St. Paul, 1973).

[4] See Thomas L. Shaffer, American Legal Ethics 184-87 (mimeo, Lexington, Va., 1984).

[5] Quoted in Michael Schudson, Public, Private, and Professional Lives: The Correspondence of David Dudley Field and Samuel Bowles, 21 Amer. J. of Legal History 191 (1977).

[6] The standard source for this "functionalist" view of the professions is Talcott Parsons, The Social System (1951), and The Professions and Social Structure, in T. Parsons, Essays in Sociological Theory 34-49 (rev. ed. 1954). See also John P. Heinz, The Power of Lawyers, 17 Ga. L. Rev. 891, 892-93 (1983).

[7] Heinz, op. cit. note 6, at 893.

[8] George Bernard Shaw, The Doctor's Dilemma, Act I, at 116 (Penguin ed. 1954).

[9] See, e.g., Magali Larson, The Rise of Professionalism: A Sociological Analysis (1977); Elliot Friedson, Professional Dominance; The Social Structure of Medical Care (1970); Milton Friedman, Capitalism and Freedom 144-49 (1962).

both with lawyers as individuals and with the profession as a whole.

The public interest theory posits first that the lawyer is an independent operator who exercises control over his own work and a large moral influence over clients. As Elihu Root said: "about half of the practice of a decent lawyer consists in telling clients that they are being damned fools and should stop.[10] On the other hand, J.P. Morgan, confronted by a nay-saying lawyer, said: "Your job is to help me do what I want to do.[11]

Is today's lawyer a buffer between the illegitimate or immoral desires of clients and the public interest? Or is the lawyer the amoral facilitator of the client's selfish goals? No one knows which impulse is dominant, but my guess is that there is plenty of both. My fear is that over time there is less willingness to engage in moral dialogue with clients—the "hired-gun" mentality is convenient, profitable, and finds increasing support in the profession's own ideology.

It is unnecessary here to delineate all of the structural and economic circumstances that push toward the "hired-gun" mentality. The increasing specialization of the bar has dissolved collegial ties and relates each lawyer, not to the profession at large, but to clients with a particular interest. The increasing competition for legal work; the growth in the size of organizations in which law practice is carried on; the assertion of control over legal work by corporate clients; and the tendency of lawyers to identify with the views and interests of their clients—all tend to make lawyers dependent upon clients rather than a possible moral influence on them.[12]

The onslaught of competition and commercialism in the once-genteel precincts of the corporate bar is vividly portrayed in contemporary press accounts. The message is that greed has come out of the closet; that the byword is now "produce or perish"; that the "heavy hitters" will split off on their own if they are asked to subsidize the *pro bono* work of others—"you eat only what you kill" is the way one entrepreneurial lawyer put it.[13] When corporate lawyers get together today, the talk is not of the plight of legal services for the poor or law reform but of ways of hustling for clients: marketing plans, seminars for new clients, public relations brochures and blitzes.[14] Instead of talking about the personal responsibility of a lawyer for a client, the talk is of top-down and outside control of legal work. "We're managing a tough business," one managing partner says, "and there's no place for democracy." The new style of corporate general counsel selects outside lawyers and monitors their work in detail—"we're in the driver's seat when it comes to fees and services," one recently said. If these are contemporary realities within the elite sectors of the profession, the scramble for business and profit is hardly likely to be less in the less prestigious and more crowded sector of the profession that serves private individuals.[15]

The public interest model also posits that lawyers are willing to devote time to public service goals and to temper their representation of clients on behalf of the same goals. The willingness of lawyers to defend the liberties of all by protecting the rights of some is a periodic and noble reality. This willingness functions best, a cynic might add, when the unpopular defendent is a wealthy rather than indigent scoundrel or the possibility of a large attorney-fee award provides a comparable incentive. Although lawyers give enormous amounts of time to public service in a general way, they are not generous in providing legal services to those unable to pay. The average *pro bono* contribution of the bar is only 6 percent of billable hours, and most of that is devoted to such client-producing activities as work for nonprofit organizations or participation in CLE programs.[16] Although these are good things, they do not provide legal services to needy people.

I am a typical example. My *pro bono* work is speaking without fee to legal and other professional groups; I cannot find the time and commitment to help some needy individuals with their routine legal problems. Think of what the public image of American bar would be if each of us—all 700,000—handled six routine matters each year for our less fortunate fellow citizens. If over 4 million Americans each year experience the generosity and skill of lawyers, would the public perceive of us as selfish and heartless?

The current battleground in legal ethics is the tension between all-out loyalty to client and continuing respect for countervailing public goals.[17] Professional rules continue to require lawyers to respect the integrity of the judicial process, but other aspects of the public responsibility side of the equation are diminishing. The evolution of the new Model Rules of Professional Conduct is illustrative.

Consider the situation of the lawyer who is negotiating or

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[10] Quoted in Martin Mayer, The Lawyers 6 (1967).

[11] Quoted in Heinz, op. cit. note 6, supra, at 900.

[12] See Robert Nelson, Practice and Privilege; Social Change and the Structue of Large Law Firms, 1981 Am. B. Fdn. Research J. 97; John D. Heinz and Edward Laumann, Chicago Lawyers: The Social Structure of the Bar (1982); Murray L. Schwartz, The Reorganization of the Legal Profession, 58 Tex. L. Rev. 1269 (1980).

[13] See e.g., The Big-Law Business, Newsweek 87 (April 16, 1984); Richard Greene, Lawyers versus the Marketplace, Business Week 66 (April 9,1984).

[14] Newsweek, op. cit. note 13 supra.

[15] The division of the profession into two large sectors is a major theme of Heinz & Laumann, op. cit. note 12 supra.

[16] See G. Hazard & D. Rhode, The Legal Profession: Responsibility and Regulation 410-14 (2d ed. 1988).

[17] See, e.g., David Luban (ed.), The Good Lawyer (Totawa, N.J., 1983); Geoffrey C. Hazard, Jr., Ethics in the Practice of Law (New Haven, 1980).

litigating with an unrepresented party. The older ethic of the profession counselled fairness to the adversary in this situation.[18] The modern ideology is that unrepresented or inexperienced parties are entitled to no favors—running over a patsy is accepted behavior. The early versions of the new Model Rules attempted to rescusitate the public responsibility ethic by enjoining lawyers in such situations from "unfairly exploiting ignorance of the law or the tribunal" and "procur[ing] an unconscionable result." In response to vehement bar opposition, these provisions were deleted. The patsy is a target of opportunity, not the source of ethical concern.

The confidentiality provisions of the new Model Rules go so far toward the "hired gun" model that they are a public embarrassment. A lawyer who has discovered his client's intent to commit a massive fraud may not disclose but must remain silent.[19] The justification for this extreme position is that any departure from client confidentiality will destroy the trust and candor that are essential to effective representation. But lawyers and clients have lived with the indeterminacy of the attorney-client privilege for many decades and it is surely not self-evident that continuation of one modest exception will be any more destructive of the lawyer/client relationship than continuation of another—that lawyers may breach a confidence in suing for a fee. "What is clear," Deborah Rhode has said, "is that the profession today gives higher priority to its own pecuniary concerns than it does to the potentially more significant claims of victims of client wrongdoing."[20]

Ironically, this extreme position on non-disclosure is destructive of professional independence. Lacking the discretion and leverage to disclose the client's continuing fraud, the lawyer is tied to the client's apron strings. He becomes an instrument of client wrongdoing, with silent withdrawal his only recourse. The grand rhetoric of public responsibility is displaced by the "mouthpiece" role.

The increasingly dominant ideology of professional behavior today is aptly described as the total commitment model—the lawyer should do everything for the client that the client would do for himself if he had the lawyer's skill and knowledge.[21] Professional rules contain some discretion to depart from total commitment to the client's cause, but the basic constraints are references to general law—the lawyer should not be a lawbreaker on behalf of a client. But much that is immoral or undesirable is not illegal, so the total commitment model pushes lawyers toward amoral if not immoral bahavior in advancing the client's interest. It also, circumstances permitting, pushes the lawyer to adversary excesses that burden, delay, and distort the justice system—spurious claims and defenses, discovery abuses, tactical games, and the like. As Deborah Rhode says—"a lawyer will leave no stone unturned, especially when he is being paid by the stone."[22] The obsessive pursuit of billable hours results in such legendary feats as that of the Wall Street associate who took advantage of time changes on a transcontinental flight to bill 27 hours in a single day.[23]

At the collective level, there is much to be said in terms of the organized bar's devotion to law reform, improved access to justice, more competent lawyers, and other public objectives. But there is a dark side to this moon as well. Many of the major steps in insuring that middle-class and lower-class Americans obtain legal services at a reasonable price have been forced on a reluctant bar which sought to protect its own turf: it was the Supreme Court, not the bar, that eliminated minimum fee schedules,[24] opened up opportunties for group legal services and prepaid plans,[25] and struck down restrictions on lawyer advertising.[26] These changes, by preventing the organized bar from restricting competition among lawyers, have provided consumers of legal services with greater choice of price and quality.[27] The gradual demise of many of the unauthorized practice restriction also gives wider choice to consumers.[28]

The major difficulty with the bar as a whole, however, is not its occasional pursuit of self interest but its fragmentation. De facto specialization gives each lawyer little affinity with other lawyers and the profession generally. Bar associations become general umbrella organizations so broad and diverse in

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[18] See Alvin Rubin, A Causerie on Lawyers' Ethics in Negotiation, 35 La. L. Rev. 577 (1975); *cf.* James J. White, Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation, 1980 Am. B. Fdn. Research J. 926.

[19] ABA Model Rules of Professional Conduct 1.6 (1984). On lawyer confidentiality generally, see the materials excerpted and discussed in Andrew L. Kaufman, Problems in Professional Resposibility (2d ed.) c. 4 (Boston, 1984).

[20] Deborah L. Rhode, Ethical Perspectives on Legal Practice, 37 Stanford L. Rev. 589 (1985).

[21] See Murray L. Schwartz, The Professionalism and Accountability of Lawyers, 66 Cal. L. Rev. 669 (1982), and The Zeal of the Civil Advocate, 1983 Am, B. Fdn. Research J. 543.

[22] Rhode, op. cit. note 20 supra.

[23] See James B. Stewart, The Partners: Inside America's Most Powerful Law Firms (New York, 1983), for this and other stories about legislature corporate practice.

[24] Goldfarb v. Virginia State Bar, 421 U.S. 733 (1975).

[25] United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217 (1967). See generally Note, An Assessment of Alternative Strategies for Increasing Access to Legal Services, 90 Yale L.J. 122 (1980).

[26] Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Shapero v. Kentucky Bar Ass'n 108 S. Ct. 1916 (1988).

[27] See Bryant Garth, Lawyer Competence and the Consumer Perspective, 1983 Wis. L. Rev. 639.

[28] See Deborah Rhode, Policing the Professional Monopoly: A Constitutional and Emprical Analysis of Unauthorized Practice Prohibitions, 34 Stanford L. Rev. 1 (1981).

character that they are unable to take a clear position on any significant issue of law reform or improvement of justice.[29] They are largely reduced to striking symbolic poses—perhaps we speak in grand terms of the lawyer's professional independence because we cannot agree on such matters as abuses in the use of contingent fees or reform of products liability law.

More than 50 years ago Karl Llewellyn said that "'The Bar' is . . . an almost meaningless conglomeration . . . inert beyond easy understanding."[30] Developments since he spoke have furthered the diversity and fragmentation of the bar.

Nor are we impervious to general trends in a materialistic and self-indulgent society. Lawyers, like other groups, emphsize their rights and interests, but very rarely speak of concomitant responsibilities. When the ABA Section of Individual Rights was proposed, a wise amendment added two words: "and Responsibilities." Yet nearly the entire output of the Section deals with the claims and entitlements of individuals or groups, not the obligations that each citizen owes to each other and to the body politic.[31] "The vision of modern America," Robert Stevens has warned, "is psychiatrists telling their patients that they should have no guilt and lawyers telling their clients they have no responsibilities and accepting none for themselves."[32] What do I conclude? The lawyer's professional independence *is* a memory founded on idealism and public service; it emphasizes a sense of community within the bar and the society generally; and it is nutured by most of the things that really matter—altruism, trust, compassion, sharing, and caring. This ideal is and has been an occasional reality in the lives of the heroes of the bar whose memories we celebrate. Finally, it is a vision and dream that can shape our goals and aspirations even though there is a large shortfall between their generous scope and the selfish narrowness of many of our actions. Hypocrites we may sometimes be when we talk nobly of these unrealized aspirations. But cynicism, greed and despair, the sages tell us, are worse sins than that of hypocrisy. If our beliefs are important to us, even though not always observed, they will still influence our behavior.

And what is the alternative? The cynicism and greed of current tendencies to view law and justice solely in instrumental and market terms? The despair that follows our realization that the coercive power of the state cannot achieve our goals by external regulation? The ideal—and occasional reality—of the lawyer's professional independence has the same justification as democracy: "a terrible system of government," Winston Churchill said, "until you consider the alternatives." Ideals do have consequences. A vision of ourselves as professionals who temper zeal for the client with communal values is worth nuturing and cherishing.

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[29] See Heinz & Laumann, op. cit. note 12 supra.

[30] Karl N. Llewellyn, The Bar's Troubles, and Poultices—and Cures?, 5 Law & Contemp. Probs. 104 (1938).

[31] See Dallin H. Oaks, Rights and Responsibilities, Vinson Memorial Lecture, Mercer University, April 25, 1984 (mimeo).

[32] Robert B. Stevens, The Nature of a Learned Profession (mimeo address).

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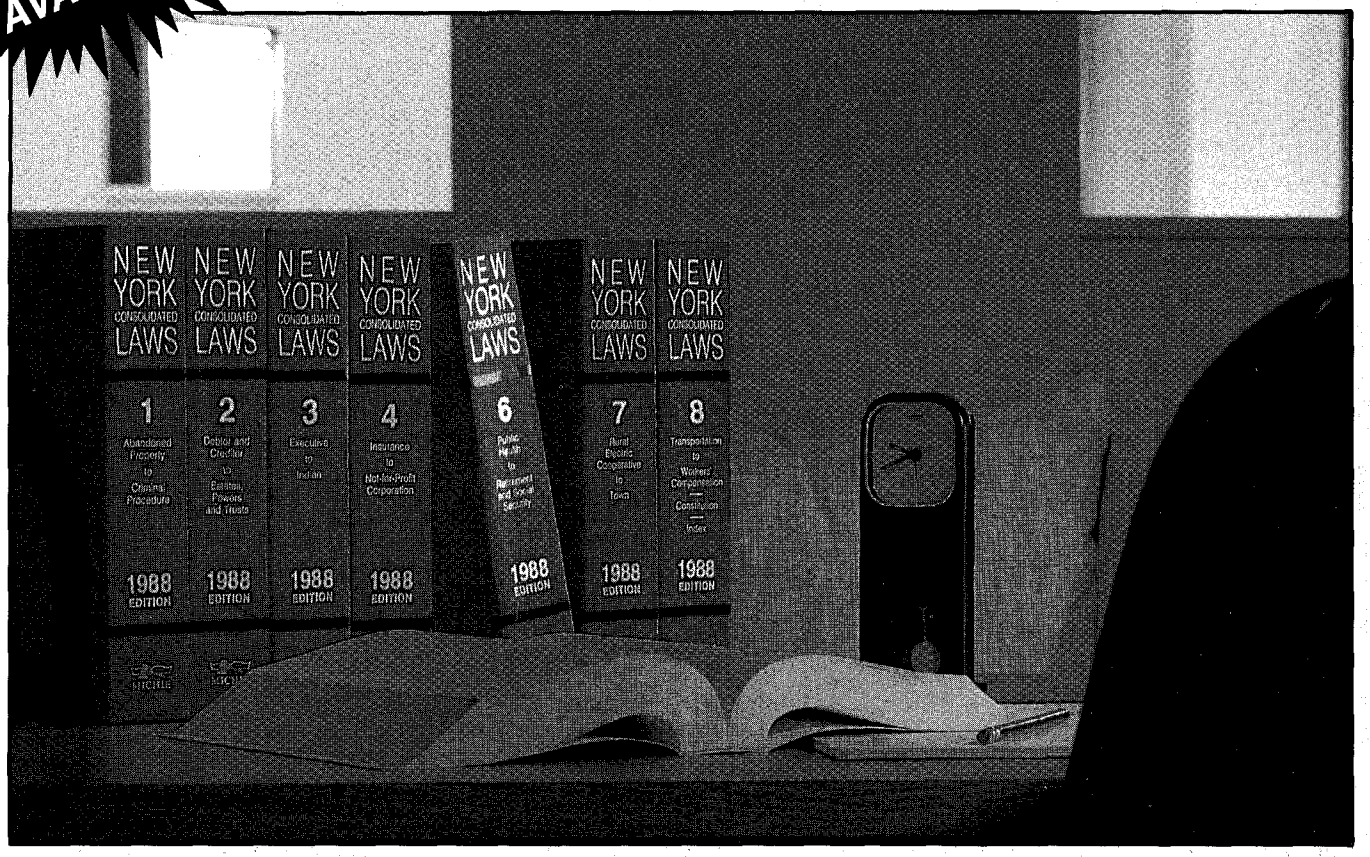

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